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In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS
NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether it is appropriate for a court to apply a presumption against preemption when the governing federal statute contains an unambiguous express preemption provision.

2. Whether the Federal Railroad Safety Act preempts state tort claims alleging the inadequacy of warning devices at railroad crossings, when the devices were installed with federal funds under a project approved by the federal government.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation whose membership consists of 124 major manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products. PLAC's primary purpose is to file *amicus* briefs in cases involving issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus* briefs in both state and federal courts, including many in this Court.

This case, which concerns the scope of the preemption doctrine, raises issues of considerable importance to *amicus* and its members. The court of appeals took an unduly cramped approach to the doctrine and, in doing so, misconstrued existing precedent of this Court; if applied in other contexts, the court of appeals' mode of preemption analysis would lead to the proliferation of varying and often conflicting rules governing the manufacture, distribution, and use of products in different jurisdictions. Because this outcome would impose substantial burdens and expense on manufacturers, sellers, and consumers — and because it often would frustrate the intent of Congress and federal regulatory agencies — we submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' analysis went astray in several crucial respects. *First*, the court erred in applying a presumption against preemption. Because it is fundamental that preemption turns on congressional intent — and because

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by *amicus* and was written entirely by its counsel.

the Court conducts an inquiry into preemption by "'begin[ning] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose'" (*FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990) (citation omitted)) -- any presumption regarding preemption must yield to the usual tools of statutory construction. In the presence of an express preemption clause, a presumption logically could come into play only when the statutory language is wholly ambiguous and the circumstances suggest that it would be inconsistent with congressional intent to displace state law. But that is not the case here: the controlling language is unambiguous, and there is no reason to believe that Congress would have wanted to preserve inconsistent state-law rules.

Second, the court of appeals misunderstood this Court's holding in *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Interpreting the plain language of the controlling statute, the Court in *Easterwood* found that regulations issued by the Secretary of Transportation displace state rules that apply to railway crossings "in which federal funds participate in the installation of warning devices." *Id.* at 670. That analysis dictates the outcome of this case, in which federal funds inarguably *were* involved in construction of the warning device at issue. The court of appeals' contrary view — that preemption is appropriate only if the Secretary specifically approved the device used at a particular crossing — is insupportable: the plain language of the statute requires preemption when the Secretary's regulation "cover[s] the subject matter of the State requirement" (49 U.S.C. § 20106), and that is the case here.

Third, the court of appeals lost sight of the policies underlying the governing statute and regulations. That both the state and federal laws are in some sense directed at promoting safety is beside the point: when Congress has required uniformity, state laws are not saved simply because they are consistent with the federal goals. And the court took

no account of the practical consequences of its ruling. Under the federal statute and regulations, the Secretary ultimately is responsible both for determining the scope of a railroad's involvement in the selection of warning devices and for approving the device actually selected. As a consequence, the court of appeals imposed a regime that would hold railroads liable for decisions that were overseen and approved by federal authorities. Congress could not have intended such an unfair result.

ARGUMENT

FEDERAL LAW PREEMPTS STATE TORT CLAIMS ASSERTING THAT WARNING DEVICES AT FEDERALLY-FUNDED RAILWAY GRADE CROSSINGS ARE INADEQUATE

A. A "Presumption Against Preemption" Is Not Appropriate In This Case

1. The court of appeals began its analysis by declaring that courts must resolve cases like this one by applying a presumption against preemption. 173 F.3d at 394 ("preemption analysis must 'start with the assumption that the historic police powers of the States [were] not to be superseded by [the] Federal Act unless that [was] the clear and manifest purpose of Congress'") (quoting *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), in turn quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (bracketed material added by the court of appeals). But the application of this presumption — which infected the entirety of the court's analysis — was unwarranted. We have argued elsewhere that a presumption against preemption may have validity only in very narrow circumstances.[2] Its use certainly cannot be justified in a case, like this one, in which

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[2] See Br. of the Product Liability Advisory Council, Inc, in *United States* v. *Locke*, Nos. 98-1701 and 98-1706.

Congress expressly defined the scope of preemption while acting in an area that historically has received federal attention.

There is considerable illogic in application of the court of appeals' presumption here. *First*, applying the presumption where there is an express preemption provision generally will conflict with the central, universally acknowledged rule governing preemption cases: "[p]re-emption fundamentally is a question of congressional intent." *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990).[3] Even decisions that have forcefully stated the presumption have gone on to recognize that the Court's

> analysis of the scope of [a] statute's pre-emption is guided by [the] oft-repeated comment, initially made in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), that "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case." * * * As a result, any understanding of the scope of a pre-emptive statute must rest primarily on "a fair understanding of congressional purpose."

Medtronic, Inc. v. *Lohr*, 518 U.S. 470, 485-486 (1996) (quoting *Cipollone*, 505 U.S. at 530 n.27 (Stevens, J.)). See, *e.g.*, *New York State Conference of Blue Cross and Blue Shield Plans* v. *Travelers, Inc.*, 514 U.S. 645, 655 (1995); *Gade*, 505 U.S. at 116 (Souter, J., dissenting). Thus, the Court's "ultimate task in any pre-emption case is to determine

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[3] See, *e.g.*, *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992) (plurality opinion); *Cipollone*, 505 U.S. at 545 (opinion of Scalia, J.); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985); *Hillsborough County* v. *Automated Medical Lab., Inc.*, 471 U.S. 707, 714 (1985); *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 500 (1984); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

whether state regulation is consistent with the structure and purpose of the statute as a whole" (*Gade*, 505 U.S. at 98 (plurality opinion)), an inquiry that "'begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *FMC Corp.*, 498 U.S. at 57 (1990) (citation omitted).

Against this background, it is settled that, "'[i]f the intent of Congress is clear, that is the end of the matter; for the court * * * must give effect to the unambiguously expressed intent of Congress.'" *Id.* at 57 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnote omitted)). Thus, any presumption against preemption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself." *Cipollone*, 505 U.S. at 545 (opinion of Scalia, J.). See generally *id.* at 544 ("Under the Supremacy Clause, * * * [the Court's] job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."). Indeed, the Court in *Easterwood*, after adverting to the presumption against preemption, proceeded to declare (somewhat inconsistently) that, "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's intent." 507 U.S. at 664. It therefore appears that, when Congress has enacted an express preemption clause, the presumption must yield to the ordinary tools of statutory interpretation.

Indeed, for a court to apply an interpretive presumption at the expense of concrete indicia of congressional intent would depart from the proper judicial role. As a recent commentator has noted, "the constitutional structure of federalism does not admit of a general presumption against federal preemption of state law." Viet D. Dinh, *Reassessing the Presumption Against Preemption*, ___ GEO. L.J.

(forthcoming 2000) (which has been lodged with the Clerk of the Court). The Supremacy Clause is not an affirmative grant of power to Congress; it "simply specifies the constitutional equivalent of a choice of law rule and gives trumping effect to federal law." *Id.* at 5. As such, the power to preempt state law comes not from the Supremacy Clause, but from the affirmative grants of power in Article I, section 8 of the Constitution.

> Given this constitutional structure, to the extent that there are questions of constitutional policy in preemption — questions about the relative power of Congress and of the state legislatures, "the Danger * * * that the national would swallow up the State Legislatures," and the like — those questions were answered by the framers with the specific enumerations and limitations of federal legislative power in Article I and inclusion of the Supremacy Clause in the Constitution. And to the extent that other federalism questions remain — the wisdom of national regulation, the balance between regulatory uniformity and policy innovations, etc. — those questions are, by constitutional design, to be answered by Congress and, through delegated power, by the executive branch.

But when Congress has legislated consistently with its delegated and limited powers, the question ceases to be one about the vertical distribution of powers between federal and state governments (after all, the Constitution gave Congress the power to legislate, and Congress has exercised that power). Rather, the question becomes one of the horizontal division of federal governmental functions among the three branches. Specifically, the task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law — in short, the task of statutory construction. If in performing this seemingly neutral task * * * the Court systematically favors one result to the other, it either disrupts the constitutional division of

> power between federal and state governments or rewrites the laws enacted by Congress.

Id. at 6-7 (footnotes omitted).

Second, in light of the primacy of congressional intent, it is not surprising that the presumption against preemption is, more often than not, simply ignored. To be sure, there are a fair number of cases in which the Court has recited the familiar phrases acknowledging the presumption.[4] But there are numerous preemption decisions in which the Court has made no mention of the presumption at all. Justice Scalia has referred to the substantial body of cases in which the Court "said not a word about 'a presumption against * * * pre-emption, * * * that was to be applied to construction of the text [of a statutory preemption clause]." *Cipollone*, 505 U.S. at 546 (opinion of Scalia, J.).[5] In fact, there are a great many decisions involving express preemption where the Court has wholly disregarded any presumption against superseding state law.[6] This pattern of inconsistent application suggests that there is less to the presumption than first meets the eye.

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[4] See, *e.g.*, *Medtronic*, 518 U.S. at 485; *New York State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655; *Cipollone*, 505 U.S. at 518; *English*, 496 U.S. at 79; *Hillsborough County*, 471 U.S. at 715.

[5] Justice Scalia cited *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *Norfolk & W. Ry. Co.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117 (1991).

[6] See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995); *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990); *Louisiana Pub. Serv. Comm'n* v. *Federal Communications Comm'n*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

Third, the traditional rationale for the presumption does not support its use. The presumption often is said to rest on "principles of federalism and respect for state sovereignty." *Cipollone*, 505 U.S. at 533 (opinion of Blackmun, J.). But this special solicitude for important state interests is in tension with other aspects of preemption doctrine, which regard the importance of the state interest at stake as wholly *irrelevant* to the analysis. Thus, it has long been settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). Indeed, even where the State has a "compelling interest" in preservation of its law, "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, * * * clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade*, 505 U.S. at 108 (1992) (internal quotation marks and citations omitted). See, *e.g.*, *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 503 (1984).

2. Against this background, we believe that, in the presence of a statutory preemption clause, a presumption against preemption may have validity only in limited circumstances: where the statutory language is wholly ambiguous and the statutory purpose regarding preemption completely indeterminate, *and* where the circumstances suggest that it would be inconsistent with congressional intent to supersede state law. Thus, if an ambiguous statute operates in a field where state regulation has had "historic primacy" (*Medtronic*, 518 U.S. at 485) — that is, where the federal government traditionally has not acted and the federal interest in a uniform rule is not apparent — it may make sense to presume that a Congress acting with this history in mind did not intend to displace state law. But such a

presumption should have no application in areas where Congress has often been active, where there is a federal interest in uniformity of regulation, or where federal primacy is rooted either in tradition or in constitutional values.

That is the case here. The Federal Railroad Safety Act ("FRSA") indisputably delegated to the Secretary of Transportation the authority to preempt state laws relating to railroad safety. See 49 U.S.C. § 20106 ("Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety *until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement*.") (emphasis added).[7] The Secretary exercised his authority to prescribe, among others, regulations related to the installation of warning devices at railway-highway grade crossings (see 23 C.F.R. §§ 646.214(b)(3)[8]

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[7] The FRSA initially was codified at 45 U.S.C. §§ 421-444. That Act later was repealed and its substantive provisions re-enacted as part of title 49. See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 1379.

[8] 23 C.F.R. § 646.214(b)(3)(i) provides: "*Adequate warning devices*, under § 646.214(b)(2) or any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track

and (b)(4)[9]). Those regulations preempt state law. See *Easterwood*, 507 U.S. at 670 (subsections (b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained"). Because Congress has expressly and unambiguously defined the statute's preemptive scope, there is no room for application of a presumption against preemption.

That is particularly so given the nature of the regulated field, which historically has drawn the attention of Congress. Congress has appropriated federal funds for use by the States at railway-highway crossings from the inception of the Federal Aid Highway Act, Act of July 11, 1916, ch.41, 89 Stat. 355. For more than 60 years, Congress also has prohibited the expenditure of federal funds on federal-aid

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crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable."

[9] 23 C.F.R. § 646.214(b)(4) provides: "For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA."

highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e). And Congress has long expressed doubt that disparate state efforts in this area are useful; at the time of the enactment of the FRSA, it questioned whether "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 91-1194, at 11 (1970). Cf., *e.g.*, *United Transp. Union* v. *Long Island R.R. Co.*, 455 U.S. 678, 687-688 (1982) ("Railroads have been subject to comprehensive federal regulation for nearly a century. * * * There is no comparable history of longstanding state regulation."); *R.J. Corman R.R. Co.* v. *Palmore*, 999 F.2d 149, 152 (6th Cir. 1993) (Congress has long regulated "almost all aspects of the railroad industry"). Against this background, there is no reason to presume that Congress acted with any special expectations about the value of state regulation here.

3. The court of appeals therefore erred in applying a presumption against preemption. And the court compounded its analytical error by finding that the presumption "looms even larger in the present context, where no analogous federal remedy exists." 173 F.3d at 394. That conclusion runs counter to settled law. This Court has often found preemption "even when the state action purported to authorize a remedy unavailable under the federal provision." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 55 (1987). In *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 391 n.4 (1987), for example, the Court overturned a court of appeals' decision rejecting preemption "unless the federal cause of action relied upon provides the plaintiff with a remedy"; in so ruling, the Court emphasized that federal law is preemptive despite the fact that "the relief sought by the plaintiff could be obtained only" under state law. This principle has been consistently

followed. See, *e.g.*, *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 287 (1986); *Local 926, Int'l Union of Operating Eng'rs* v. *Jones*, 460 U.S. 669, 684 (1983); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile* Co., 450 U.S. 311, 322-23 (1981). Indeed, there are many circumstances where the State's provision of a remedy that is withheld by federal law *confirms* the conflict between the state and federal regime. See, *e.g.*, *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959).

The fundamental flaw in the court of appeals' reasoning was its inversion of the proper preemption analysis. The court focused first on the result if it were to find preemption. Concluding that the plaintiff would be without a remedy if state law were preempted, the court of appeals tipped the scales against preemption. The appropriate analysis, however, begins and ends with an inquiry into whether Congress intended to preempt state law. Absent evidence that Congress intended to preserve remedies for particular categories of plaintiffs, it should have been irrelevant that state law remedies were displaced. That is always the impact of preemption, and Congress is not required to provide an analogous remedy before it may preempt. Indeed, Congress may, and sometimes does, preempt without leaving any remedy at all for potential plaintiffs. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 584 (1981) ("A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed.").

B. *Easterwood* Compels Preemption In Cases Where Federal Funds Have Been Authorized For The Installation Of Warning Devices At Railroad Crossings

The court of appeals plainly regarded reliance on the presumption against preemption as an essential element of its holding. But the court also went on to add that, "[i]n addition

to being in harmony with the presumption against preemption, the narrow approach is more faithful to the Supreme Court's holding in *Easterwood*." 173 F.3d at 395. In our view, that pronouncement is insupportable. The court of appeals misconstrued both the plain language of the controlling statute and the unambiguous holding of *Easterwood*, while disregarding fundamental rules limiting the powers of federal courts.

1. In *Easterwood*, the Court addressed the proper interpretation of the statutory language that controls in this case, which provides that States may "adopt or continue in force a law, regulation, or order related to railroad safety *until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement*." 49 U.S.C. § 20106 (emphasis added). In determining the scope of this language, the Court characterized the relevant question as "whether the Secretary of Transportation has issued regulations covering the same subject matter as [state] negligence law pertaining to the maintenance of * * * grade crossings." 507 U.S. at 664. This means that preemption is required "if the federal regulations *substantially subsume* the *subject matter* of the relevant state law." *Ibid.* (emphasis added).

The Court accordingly turned to a review of the regulatory background, explaining that, for crossings "in which 'Federal-aid funds participate in the installation of the [warning] devices,' regulations specify warning devices that must be installed." 507 U.S. at 666 (citing 23 C.F.R. §§ 646.214(b)(3) and (4). Depending on the characteristics of the crossing, the regulations either dictate the particular type of device to be used or provide that "the type of warning device to be installed, whether the determination is made by a State . . . agency, and/or the railroad, is subject to approval of the FHWA.'" *Id.* at 666-667 (quoting 23 C.F.R.

§ 646.214(b)(4) (ellipses added by the Court)).[10] Looking to this regulatory structure, the Court found that the regulations

> displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. Indeed, §§ 646.214(b)(3) and (4) effectively set the terms under which railroads are to participate in the improvement of crossings. * * * In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. *The Secretary's regulations therefore cover the subject matter of the state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.*

Id. at 670-671 (emphasis added). This means that, "when [the regulations] are applicable, state tort law is pre-empted." *Id.* at 670.

Applying that principle in *Easterwood*, the Court went on to find preemption inappropriate because the record revealed that federal funds had *not* "'participate[d] in the installation of the [warning] devices'" at issue in the case. 507 U.S. at 672 (bracketed material added by the Court). "In light of the inapplicability of §§ 646.214(b)(3) and (4)" to the crossings in *Easterwood*, the Court "conclude[d] that [the plaintiff's] grade crossing claim [was] not pre-empted." *Id.* at 673.

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[10] Congress has dealt with railroad safety through the FRSA and the Highway Safety Act (23 U.S.C. §§ 101 *et seq.*). The Secretary prescribed 23 C.F.R. § 646.214 pursuant to both of those statutes. See *Easterwood*, 507 U.S. at 663 & n.4. The regulations were promulgated by the Secretary through the Federal Highway Administration ("FHWA").

This analysis would seem to make preemption self-evident in this case, where the federal regulations *are* applicable. Here, the Tennessee Department of Transportation submitted a proposal to the FHWA for a state-wide project to upgrade safety at railroad crossings. The FHWA approved the project and authorized funding. The project included the installation of a passive warning device at the Oakwood Church Road Crossing and, consequently, federal funds participated in the installation of the warning device at issue. 173 F.3d at 388. Under *Easterwood*, the FHWA's authorization of funds accordingly triggered the preemptive effect of the relevant regulations, and that should have been the end of the court of appeals' analysis.[11]

2. The court of appeals took a different approach. It read *Easterwood* to stand for the proposition that the participation of federal funding is necessary but not sufficient to establish preemption. In addition to determining whether subsections (b)(3) or (4) are *applicable*, the Sixth Circuit believed that a court must determine that the Secretary *in fact* made a site-specific determination about the propriety of the particular device used. 173 F.3d at 393. Thus, the court of appeals concluded that, for preemption to apply in this case, the railroad had to show not only that federal funds participated in erection of the warning device, but also that the FHWA actually analyzed the device installed at the Oakwood Church Road Crossing. Because the crossing in

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[11] A substantial majority of the courts to address this issue have agreed. See, *e.g.*, *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858 (11th Cir. 1998); *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod* v. *Burlington N. R.R. Co.*, 68 F.3d 241 (8th Cir. 1995); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995).

this case had a passive warning device,[12] § 646.214(b)(4) is the applicable provision of the regulations. Under the terms of subsection (b)(4), the warning device was subject to the "approval" of the FHWA. In the Sixth Circuit's view, the authorization of funds was insufficient to constitute "approval" within the meaning of subsection (b)(4).

This approach, however, simply disregarded both the plain terms of the statutory language and this Court's analysis in *Easterwood*. Under the statute, preemption turns on whether a federal regulation "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106. That inarguably is the case here; the Secretary's regulations address the nature of federally-aided warning devices required at railway crossings, which plainly is the subject matter of the state common law rule relied upon by respondent. *Easterwood*, meanwhile, gave the statute its plain reading, holding that preemption is required when the Secretary's regulations are "applicable." 507 U.S. at 670. And here, of course, the regulations are applicable. As the Tenth Circuit explained in similar circumstances, "the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands." *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996).

In addition, the Sixth Circuit's decision essentially rewrites the Secretary's regulations. The Secretary prescribed rules that outline the procedures by which a State may submit

[12] Passive warning devices are "traffic control devices * * * located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." 23 C.F.R. § 646.204. Active warning devices include "flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen." *Ibid.*

proposals for federal-aid projects to the FHWA, including projects at railroad crossings, and the methods by which such projects are to be approved by the FHWA. See 23 C.F.R. §§ 630.201-630.205 (outlining procedures for submitting proposals to the FHWA); 23 C.F.R. § 630.102 ("The purpose of this subpart is to prescribe policies for authorizing Federal-aid projects."). Before the FHWA may give authorization to proceed, the requirements outlined in the regulations must be satisfied.[13] Moreover, no funds for a railroad crossing project may be authorized "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any * * * railroad grade crossing * * *." 23 U.S.C. § 109(e). And the selection of a passive warning device installed at a particular crossing is "subject to the approval of FHWA." 23 C.F.R. § 646.214(b)(4).

Accordingly, under the regulatory scheme, the FHWA may not authorize or fund the installation of warning devices unless the devices meet federal guidelines. The Sixth Circuit nonetheless held that the mere authorization of funds did not suffice to demonstrate FHWA approval; instead, the court of appeals believed that there had to be additional evidence that the FHWA made *individualized* findings approving the warning device at issue. There is, however, no requirement in the regulations that the FHWA document or make specific findings relating to each warning device that it "approv[es]." The court of appeals' holding thus hinders the FHWA's administrative functions and imposes onerous burdens on the

[13] See, *e.g.*, 23 C.F.R. § 630.106(a) ("The FHWA issuance of an authorization to proceed with a Federal-aid project shall be in response to a written request from the State highway agency (SHA). Authorization can be given only after applicable prerequisite requirements of Federal laws and implementing regulations and directives have been satisfied.").

agency that appear nowhere in the regulatory language. That constitutes impermissible judicial interference with the FHWA's regulatory scheme.

Indeed, the Sixth Circuit's decision is premised on a *non sequitur*. The court of appeals assumed that the absence of evidence that each warning device was analyzed under subsections (b)(3) and (4) indicated that the regulatory requirements were disregarded. In fact, however, because the FHWA is barred from authorizing funds for warning devices unless the devices meet adequate federal standards, the decision to authorize funds *conclusively establishes* "approval of the FHWA" within the meaning of the statute.[14] See *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 865 (11th Cir. 1998) ("[A]n express finding, however, is not the only way for the Secretary to have 'approved' of the safety devices that were installed * * *. [I]n authorizing the expenditure of federal funds to install the passive devices * * * we presume that the Secretary approved of those devices."); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 387 (5th Cir. 1995) ("The fact that federal funds participated in the installation of the

[14] The federal government agrees with this reading. In *Easterwood*, the United States took the position that

> [t]he scope of 23 C.F.R. 646.214(b) indicates that *for federally funded projects* the Secretary has covered the subject matter of what safety devices are appropriate. The regulation requires gate arms in certain circumstances, and requires FHWA approval of the safety devices in all other circumstances. Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that more or different crossing devices are necessary at a federally funded crossing is therefore preempted.

Br. for the United States at 24 (emphasis in original), Nos. 91-790 and 91-1206.

warning devices legally presupposes that the Secretary determined that the safety devices installed were adequate to their task.").[15]

C. The Goals Behind The FRSA Are Promoted By Preemption

The court of appeals attempted to justify its decision by proclaiming that "the narrow approach is more consistent with the FRSA's goals of promoting railroad safety, reducing railroad accidents, and reducing deaths and injuries as a result of such accidents." 173 F.3d at 395. In fact, the court of appeals' overly facile analysis conflicts with the policies of the FRSA.

1. As an initial matter, it is no answer to an express preemption provision that the application of state law is consistent with the policies of the statute mandating preemption. The FRSA, in addition to expressing a policy of promoting railroad safety, also determined that doing so in a nationally uniform way was the best method of achieving that goal. Indeed, Congress explicitly declared that laws "related to railroad safety shall be nationally uniform to the extent practicable." See 49 U.S.C. § 20106. When a litigant tries to avoid preemption in such circumstances, "it is not enough to say that the ultimate goal of both federal and state law" is identical. *International Paper Co.* v. *Ouellette*, 479 U.S.

[15] See also *Kennan* v. *Dow Chem. Co.*, 717 F. Supp. 799, 810 (M.D. Fla. 1989) ("If Congress has taken away the ability of the states to regulate * * * and assigned the regulation * * * to a federal agency, Congress has determined that such an assignment promotes the general welfare. Whether that federal regulatory agency carries out its function based on all available and necessary information is, therefore, irrelevant to a preemption inquiry."). That a particular decision of the Secretary might be subject to challenge under principles of administrative law does not bear on the question of preemption.

481, 494 (1987). As the Court has explained, state law is "pre-empted if it interferes with the *methods* by which the federal statute was designed to reach th[at] goal." *Id.* at 494 (citing *Michigan Canners & Freezers Ass'n* v. *Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984) (emphasis added)); see also *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386-87 (preemption provisions preempt consistent as well as inconsistent state regulations); *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould*, 475 U.S. 282, 286-87 (1986) (National Labor Relations Act prohibits not only inconsistent state regulation but also precludes state remedies for conduct violative of that Act).

2. Although the court of appeals did not give a terribly clear explanation of how it reached its result, it appears to have been motivated principally by the feeling that preemption somehow would give petitioner a benefit to which it is not entitled. The court described 23 C.F.R. §§ 646.214(b)(3) and (4) as "a system of incentives designed to increase safety at grade crossings" (173 F.3d at 395), asserting that in exchange for improving the safety of crossings, railroads are given immunity from state tort actions if they "work with the state to take the desired action." *Ibid.* The Sixth Circuit criticized the approach taken by the majority of courts — which recognizes that federal funding, by itself, is sufficient to trigger preemption — because it believed that those holdings allow "railroads [to] get the prize [of preemption] whether or not they have taken the desired action." *Ibid.*

In fact, however, it is the Sixth Circuit's holding that turns the statutory approach on its head, leading to a result that could not have been intended by Congress. That court would hold railroads liable for the decision whether to install a particular device at a given crossing. But as *Easterwood* explained, subsections (b)(3) and (4) of the regulations "effectively set the terms under which railroads are to participate in the improvement of crossings." 507 U.S. at

670. Subsection (b)(3) limits a railroad's involvement in the selection of warning devices to "participation in diagnostic teams which may recommend the use or nonuse of crossing gates." *Id.* at 671.[16] Likewise, under subsection (b)(4) "railroad participation in the initial determination of 'the type of warning device to be installed' at particular crossings is subject to the Secretary's approval." *Ibid.* Thus, as we note above, "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." *Ibid.*

In this instance, the State of Tennessee sought approval for a state-wide project to improve safety at railroad crossings, which included the installation of a passive warning device at the Oakwood Church Road Crossing. The FHWA approved the project and authorized funding. These decisions, and the regulatory structure, left no room for additional actions by petitioner. To nevertheless impose liability on petitioner for decisions taken by the State and the Secretary — decisions over which petitioner had no control — would convert the FRSA into a Kafkaesque regime. And needless to say, if railroads may be punished under state law for complying with federal regulations, the preemptive intent of the FRSA would be wholly undermined. It is impossible to believe that Congress intended such a result.

Furthermore, the unfairness of subjecting railroads to state-law tort actions would be exacerbated by the difficulty they would have in defending against those actions. Congress has provided that "reports, surveys, schedules, lists or data compiled or collected for the purpose of identifying[,] evaluating or planning the safety enhancement" of railroad crossings are inadmissible as evidence in state or federal

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[16] Indeed, as petitioner explains (at Pet. 11 n.13), Tennessee excludes railroads from diagnostic teams.

courts. 23 U.S.C. § 409. That restriction would make it virtually impossible for petitioner to obtain or use information that could demonstrate the care with which the warning device was selected and installed. This further demonstrates the unfair consequences that would result if the court of appeals' decision is allowed to stand. And it confirms that Congress could not have intended litigation to proceed in this area.

3. Finally, the court of appeals wholly disregarded Congress's explicit desire to establish uniformity in the laws relating to railroad safety. The court of appeals' decision contradicts that policy by exposing railroads to multiple and possibly inconsistent obligations imposed by the laws of all of the States. Under such an approach, differing jury outcomes — both within a State and among States — are certain to arise. The regime that inevitably would follow from the court of appeals' decision would bear no resemblance to the uniform regulatory scheme Congress intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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